STATE OF MICHIGAN

COURT OF APPEALS

ART VAN FURNITURE, INC.,

Plaintiff/Counterdefendant-Appellant,

v

DETROIT EDISON COMPANY,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
March 14, 2000

No. 207522
Macomb Circuit Court
LC No. 94-004736-CC

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting judgment in favor of defendant in this action to determine defendant's property rights in a right-of-way created in 1925 pursuant to a written agreement with plaintiff's predecessor in interest. We affirm.

Plaintiff owns a fifty-two acre parcel of property that was previously owned by the Trombley Brick Company ("Trombley"). On November 4, 1925, defendant and Trombley entered into an agreement whereby, for consideration of one dollar ($1.00), defendant and its successors and assigns were given permission "to construct, operate and maintain its lines for electric light and power, including the necessary towers, fixtures, wires and equipment" on a portion of the property. According to the agreement, Trombley reserved for itself, its successors, or assigns, the right to terminate defendant's privileges under the agreement upon six months' notice. Defendant also agreed to pay fifty dollars ($50.00) for each tower it built on the land. Three towers were eventually built.

In late 1992, after plaintiff began work to add an addition to its building on the property, defendant notified plaintiff that the addition was encroaching on defendant's utility easement. Sometime thereafter, defendant's agent allegedly told plaintiff that the easement had been granted "in perpetuity" and, in reliance upon that statement, plaintiff ceased its planned addition and made alternate construction plans. After plaintiff received a copy of the agreement from defendant and discovered the revocation clause, plaintiff notified defendant on January 27, 1993, that it was terminating the easement. Defendant did not vacate the land and plaintiff filed this lawsuit.

The trial court granted defendant's motion for summary disposition on plaintiff's claims for negligent misrepresentation and innocent misrepresentation, finding that plaintiff was not justified in relying on defendant's representations about the nature and scope of the easement. Summary disposition was also granted to defendant on plaintiff's claim for recovery under either a quantum meruit or unjust enrichment theory, based on the trial court's determination that an implied-in-law contract will not be found when a contract exists on the same subject matter. Finally, the court granted summary disposition to defendant on plaintiff's claims for trespass and to quiet title after finding that equitable principles precluded plaintiff from revoking the easement.

I

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on its claims for trespass and to quiet title because plaintiff properly terminated defendant's right to occupy the land as of July 27, 1993. The court observed that defendant had paid plaintiff's predecessor consideration for the agreement and additional consideration to construct three towers on the land and had expended large sums of money to construct the towers and run lines on the property throughout the years. Plaintiff had owned the property since at least 1976, but did not request that defendant leave the property until 1993. The court concluded that, "under these circumstances, . . . equitable principles preclude [plaintiff] from revoking the easement at this late date."

Plaintiff contends that the trial court erred because the original document created only a license, not an easement. Plaintiff maintains that the language of the 1925 document did not create an easement because it does not "convey" any interest but simply "grant[s] permission" to defendant to construct, operate, and maintain its lines on the land. The document also gives the land owner and its successors and assigns the right to revoke the rights and privileges of the grantees upon six months' written notice. Plaintiff argues that the trial court had no power to render the termination provision in the license agreement unenforceable and should have construed and enforced the agreement as made.

A license is permission to do some act or series of acts on the land of the licensor without having any permanent interest in the land. *McCastle v Scanlon*, 337 Mich 122, 133; 59 NW2d 114 (1953). Licenses are not assignable and are subject to revocation. *Id.* An easement is an interest in land through which one individual has the right to use the land of another for a specific purpose. *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 606; 456 NW2d 425 (1990). An easement is not subject to the will of the possessor of the land. 1 Cameron, Michigan Real Property Law § 6.2, p 189 (1993).

While an interest in land may not rest on an oral promise or estoppel, and expenditures of capital made in reasonable reliance on an oral promise will not create an irrevocable license to use the land, *Kitchen v Kitchen*, ___ Mich App ___, ___; ___ NW2d ___ (Docket 212418, issued December 21, 1999), a license based on a written right-of-way may ripen into an irrevocable license. *Yagiela v Detroit Edison Co*, 42 Mich App 77, 78-79; 201 NW2d 359 (1972). A license coupled with an interest is not revocable at will. *Forge v Smith*, 458 Mich 198, 210; 580 NW2d 876 (1998). "A license coupled with an interest is a privilege 'incidental to the ownership of an interest in a *chattel*

personal located on the land with respect to which the license exists.'" *Id.* at 210-211, quoting 5 Restatement Property, § 513, p 3121.

The original written agreement granted defendant a revocable license to use the described portion of plaintiff's land for the construction of lines and towers for the transmission of electricity. Defendant paid consideration for its right to use the land. As in *Hunter v Slater*, 331 Mich 1; 49 NW2d 33 (1951), a case relied upon by the trial court, plaintiff purchased the land with notice of defendant's claim to the right-of-way. Defendant's license to use the land, coupled with defendant's interest in its chattel on the land (the towers and lines) and plaintiff's long-term acquiescence to defendant's presence on the property, ripened into a nonrevocable equitable easement. Accordingly, we affirm the trial court's grant of summary disposition to defendant on plaintiff's claims for trespass and to quiet title. Under these circumstances, it would be inequitable to allow plaintiff to revoke defendant's license to use the land for its wires and transmission towers.

II

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) on plaintiff's claim for negligent misrepresentation on the ground that plaintiff had failed to allege all of the essential elements of the claim. Plaintiff's argument is without merit because the trial court granted summary disposition on this claim pursuant to MCR 2.116(C)(10) based on a finding that plaintiff could not have justifiably relied on defendant's alleged misrepresentations about the easement. To the extent plaintiff argues that the court should not have required plaintiff to amend its complaint, we find that the trial court did not abuse its discretion in requiring plaintiff to clearly allege facts giving rise to a duty owed by defendant when defendant's agent made the subject communication about the easement. See *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

III

Plaintiff next contends that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on its negligent misrepresentation claim. The tort of negligent misrepresentation requires proof that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Law Offices of Lawrence J Stockler PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). There can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant. *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992).

In granting defendant's motion for summary disposition on this claim, the court reasoned that plaintiff did not justifiably rely on defendant's statement because a February 4, 1977, insurance policy that mentioned the easement provided plaintiff with notice of the utility easement by at least 1977. Plaintiff now argues that this insurance policy was not for the property in question, but for an adjacent parcel and, therefore, a review of the applicable policy would not have provided notice because it does not mention the easement. We find, however, that plaintiff had the means to find a copy of the easement

document itself through the insurance policy. Furthermore, the evidence by which defendant claimed a right to the land sat prominently on the property in the form of electrical transmission towers and wires. Notice of some third-party interest in real property

> is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property. [*Schepke v Department of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).]

Plaintiff had sufficient notice of the existence of an easement or license by which defendant used portions of plaintiff's property that plaintiff reasonably should have made further inquiries about defendant's rights before undertaking the building project. Therefore, it was not reasonable for plaintiff simply to rely on the statements of defendant's agent regarding the scope of its interest in the property, and the trial court did not err in finding that any reliance on the part of plaintiff was not justifiable.

IV

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's claim for innocent misrepresentation. In granting summary disposition to defendant on this claim, the court stated that it had reviewed plaintiff's briefs and noted that plaintiff "specifically responded only to [defendant's] request to dismiss the claim for negligent misrepresentation. Since [plaintiff] has failed to raise any convincing argument as to why the claim for innocent misrepresentation should not be dismissed, the Court determines that there is no genuine issue of material fact that this claim should be dismissed."

Although we agree with plaintiff that its response to defendant's arguments on the negligent misrepresentation claim were equally applicable to the innocent misrepresentation claim, we affirm the trial court's ruling. As plaintiff acknowledges, innocent misrepresentation also requires that the plaintiff have justifiably relied to its detriment on the statements made by the defendant. Where there is no justifiable reliance, there can be no recovery for innocent misrepresentation. This Court will not reverse the decision of the trial court because it reached the right result, albeit for the wrong reason. *Yerkovich v AAA*, 231 Mich App 54, 68; 585 NW2d 318 (1998).

V

Plaintiff next argues that the trial court erred in granting summary disposition on its claim for recovery under an unjust enrichment or quantum meruit theory. In its amended complaint, plaintiff contended that defendant "unjustly received a benefit as a result of its unauthorized use of the Real Estate" and that plaintiff had "unjustly sustained detriment associated with changes it made to its plans to improve its building." The court determined that, because the written easement document covered the same subject matter as plaintiff's claim, plaintiff was precluded from pursuing the claim. Plaintiff argues

that the trial court erred because the easement agreement terminated on July 27, 1993, six months after plaintiff gave notice of revocation to defendant, and its claim for unjust enrichment is based on events that occurred after the express contract ceased to be in effect.

Generally, the elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff; and (2) a resulting inequity to the plaintiff because the defendant has retained the benefit. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Under such circumstances, the law will operate to imply a contract in order to prevent an unjust enrichment. *Id.* However, a contract will not be implied if there is an express contract covering the same subject matter. *Id.*

Because we affirm the trial court's ruling that plaintiff could not equitably revoke the easement, we also affirm its holding that plaintiff cannot recover under a claim that defendant was unjustly enriched by remaining on the land after the easement was terminated. Moreover, plaintiff performed no services that would entitle it to a quantum meruit recovery. See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 551; 487 NW2d 499 (1992).

VI

Finally, plaintiff argues that the trial court abused its discretion in denying its motion to strike or summarily dismiss defendant's amended counterclaim without requiring defendant to reimburse its costs and attorney fees.

In its original counterclaim, defendant filed a complaint for condemnation pursuant to its authority as a public utility under MCL 486.251 *et seq.*; MSA 22.1671 *et seq.* and under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*; MSA 8.265 *et seq.* After plaintiff filed its "first amended complaint" on July 2, 1996, defendant responded with an answer and amended counterclaim alleging that it had an easement by grant, estoppel, or prescription, and again included a claim for condemnation that largely repeated the allegations of defendant's original counterclaim.

Plaintiff now contends that the trial court erred in allowing defendant to discontinue its original counterclaim for condemnation without requiring defendant to reimburse plaintiff for its costs and attorney fees incurred in connection with the original counterclaim. Plaintiff argues that title to the easement vested in defendant pursuant to MCL 213.57; MSA 8.265(7) after it filed its first counterclaim for condemnation and plaintiff's request for a hearing on the necessity of the taking was denied. According to plaintiff, defendant attempted to withdraw its original absolute taking in the amended counterclaim, and plaintiff was therefore entitled to its costs, attorney fees, and damages under MCL 213.67; MSA 8.265(17).

The trial court did not abuse its discretion in refusing to strike defendant's amended counterclaim. By order entered June 19, 1996, the court directed plaintiff to file a second amended complaint on or before July 1, 1996, and directed defendant to file its responsive pleading on or before July 22, 1996. Although defendant should have asked the court's permission to amend its counterclaim, which it filed with its answer to plaintiff's amended complaint, the trial court indicated that it would have

granted such a request under MCR 2.118(A)(2), which both requires a party to obtain leave from the court to amend a pleading and states that leave shall be freely given when justice so requires. Therefore, in the interest of judicial economy, the court allowed the amended counterclaim to stand.

To the extent plaintiff argues that defendant discontinued its original claim for condemnation and thus should have been required to pay plaintiff's attorney fees and costs under the Uniform Condemnation Procedures Act, plaintiff's argument is without merit. Defendant did not abandon its original claim for condemnation but was required to repeat the condemnation claim in its amended counterclaim under MCR 2.118(A)(4), given that the amended pleading superseded the original counterclaim. Moreover, defendant was merely arguing in the alternative. Its primary argument was that the easement created in 1925 was still in existence and, therefore, there was no need to condemn the property.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald